

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE
LITIGATION

MDL NO. 1456

THIS DOCUMENT RELATES TO:

CLASS 1 J&J

CIVIL ACTION: 01-CV-12257-PBS

Judge Patti B. Saris

**CLASS 1 PLAINTIFFS' RESPONSE TO THE J&J DEFENDANTS' STATEMENT
REGARDING POSITIONS TAKEN BY THE DEPARTMENT OF JUSTICE
REGARDING DR. HARTMAN'S 30% BENCHMARK**

Class 1 Plaintiffs submit the following brief response to the J&J Defendants' Statement Regarding Positions Taken by the Department of Justice Regarding Dr. Hartman's 30% Benchmark [Dkt. No. 7190] to respond to two statements made in that pleading.

First, the J&J Defendants represent that Plaintiffs have admitted that the Government was aware of spreads in the range of 30% when it selected AWP as a reimbursement benchmark for Medicare. As made clear in Plaintiffs' Rule 56.1 Statement, Plaintiffs have made no such admission. *See* Dkt. No. 6835 at 6-8 (response to Statement No. 3).

Second, the J&J Defendants incorrectly claim that the DOJ "refused" to submit an amicus brief to the First Circuit regarding Dr. Hartman's 30% benchmark when the Class 1 Plaintiffs appealed this Court's entry of judgment against Class 1. The First Circuit made no request of the DOJ for an amicus brief. Moreover, there was no reason for the DOJ to submit an amicus because J&J never appealed this Court's adoption of Dr. Hartman's 30% benchmark. Indeed, J&J voluntarily dismissed its cross-appeal of this Court's entry of judgment. *See* Ex. 20 to Dkt. No. 6836 (Judgment (1st Cir. June 19, 2008) (granting J&J's unopposed motion to voluntarily

dismiss appeal pursuant to Fed. R. App. P. 42(b))). While J&J did argue in opposing *Plaintiffs'* appeal that this Court's adoption of Dr. Hartman's 30% benchmark was an alternative reason to affirm its judgment against Class 1, the First Circuit quickly dispatched with that argument because it had fully reached it in deciding the AstraZeneca appeal, where the DOJ *did* submit an amicus brief. *In re AWP*, 582 F.3d 231, 237 (1st Cir. 2009) ("And elsewhere we have rejected J&J's arguments that the district court's adoption of a 30% potential liability trigger was erroneous as a matter of law; those arguments do not provide 'alternative grounds' for affirming the district court, as urged by J&J. *See In re Pharm. Indus. Average Wholesale Price Litig. v. Johnson & Johnson.*, No. 08-1056, 582 F.3d 156, 2009 U.S. App. LEXIS 20977."). Thus, the validity of Dr. Hartman's 30% benchmark was not, as the J&J Defendants claim "squarely presented" (Dkt. No. 7190 at 2) during the Class 1 Plaintiffs' appeal.

DATED: July 21, 2010

Respectfully submitted,

By: /s/ Steve W. Berman

Thomas M. Sobol (BBO#471770)
Edward Notargiacomo (BBO#567636)
Hagens Berman Sobol Shapiro LLP
55 Cambridge Parkway, Suite 301
Cambridge, MA 02142
Telephone: (617) 482-3700
Facsimile: (617) 482-3003

Liaison Counsel

Steve W. Berman
Sean R. Matt
Hagens Berman Sobol Shapiro LLP
1918 8th Avenue, Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594

Jennifer Fountain Connolly
Hagens Berman Sobol Shapiro LLP
1629 K St. NW, Suite 300
Washington, D.C. 20006
Telephone: (202) 355-6435
Facsimile: (202) 355-6455

Kenneth A. Wexler
Wexler Wallace LLP
55 W. Monroe Street, Suite 3300
Chicago, IL 60603
Telephone: (312) 346-2222
Facsimile: (312) 346-0022

Jeffrey L. Kodroff
John A. Macoretta
Spector, Roseman, Kodroff & Willis P.C.
1818 Market Street, Suite 2500
Philadelphia, PA 19103
Telephone: (215) 496-0300
Facsimile: (215) 496-6611

Marc H. Edelson
Edelson & Associates, LLC
45 West Court Street
Doylestown, PA 18901
Telephone: (215) 230-8043
Facsimile: (215) 230-8735

Co-Lead Class Counsel

CERTIFICATE OF SERVICE BY LEXISNEXIS FILE & SERVE

In re Pharmaceutical Industry Average Wholesale Price Litigation
Master Case No. 01-cv-12257, MDL 1456

I, Steve W. Berman, hereby certify that I am one of the attorneys for the Class and that, on July 21, 2010, I caused a copy of **CLASS 1 PLAINTIFFS' RESPONSE TO THE J&J DEFENDANTS' STATEMENT REGARDING POSITIONS TAKEN BY THE DEPARTMENT OF JUSTICE REGARDING DR. HARTMAN'S 30% BENCHMARK** to be served on all counsel of record by causing same to be posted electronically via Lexis-Nexis File & Serve.

/s/ Steve W. Berman

Steve W. Berman

Hagens Berman Sobol Shapiro LLP

1918 8th Avenue, Suite 3300

Seattle, WA 98101

Telephone: (206) 623-7292

Facsimile: (206) 623-0594